

Sri Hartamas Contractors Sdn Bhd v Sri Keladi Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — SUIT NO S2 (S1)-22-870 OF 1999
KAMALANATHAN RATNAM J
16 MARCH 2001

Civil Procedure — Judgment — Default of appearance — Application to set aside — Appeal against decision — Whether defence of merits disclosed B

The defendant applied to set aside a judgment in default of appearance obtained by the plaintiff and for leave to file the defence and also for a stay of all proceedings until the hearing of the said application. The learned senior assistant registrar ('SAR') granted an order in terms of the defendant's application. The plaintiff appealed against that said decision. C

Held, allowing the appeal:

- (1) Since the company search from the registry of companies shows that the business address of the defendant was the Yap Kwan Seng address and the registered address as the Kampung Pandan address, RK Consultant Sdn Bhd must have been authorized by the defendant to receive documentation on the defendant's behalf. The court is therefore satisfied that the writ and statement of claim were properly served on the defendant at its registered address (see p 572E-F). D E
- (2) This is a very clear case where no useful purpose can be gained by setting aside the judgment in default of appearance. The defendant has no defence at all. Clearly, the learned SAR was wrong in granting an order in terms of the defendant's application (see p 573B). F

[Bahasa Malaysia summary

Defendan telah memohon untuk mengenyahkan satu penghakiman ingkar kehadiran yang diperolehi oleh plaintif dan kebenaran untuk memfailkan pembelaan dan juga untuk satu penggantungan semua prosiding sehingga perbicaraan permohonan tersebut. Penolong kanan pendaftar ('PKP') telah membenarkan satu perintah seperti dipohon terhadap permohonan defendan tersebut. Plaintif telah membuat rayuan terhadap keputusan tersebut. G

Diputuskan, membenarkan rayuan tersebut: H

- (1) Memandangkan carian syarikat daripada pejabat pendaftar syarikat menunjukkan bahawa alamat perniagaan defendan adalah alamat Yap Kwan Seng tersebut dan alamat yang berdaftar sebagai alamat Kampung Pandan, RK Consultant Sdn Bhd mungkin telah diberi kuasa oleh defendan untuk menerima pendokumentasian bagi pihak defendan. Mahkamah oleh itu I

A berpuas hati bahawa writ dan pernyataan tuntutan telah disampaikan dengan betul ke atas defendan di alamat berdaftar tersebut (lihat ms 572E–F).

(2) Ini adalah satu kes yang jelas di mana tiada tujuan berguna yang boleh diperolehi dengan mengenyepikan penghakiman ingkar kehadiran tersebut. Defendan tiada pembelaan langsung. Adalah jelas, PKP yang bijaksana telah khilaf dalam membenarkan satu perintah seperti dipohon terhadap permohonan defendan tersebut (lihat ms 573B).]

C **Notes**

For cases on judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2534–2569.

S Murthi (Vasdev Bakshani & Associates) for the appellant/plaintiff.

S Sivanesan (Satha & Co) for the respondent/defendant.

D **Kamalanathan Ratnam J**

The appeal

E The defendant applied to set aside the judgment in default of appearance obtained by the plaintiff and for leave to file the defence and also for a stay of all proceedings until the hearing of the said application. On 6 September 2000, the learned senior assistant registrar ('SAR') granted an order in terms of the defendant's application. This is the plaintiff's appeal against that said decision.

F *Facts and chronology of events*

The defendant's address stated in the writ was No 5, Persiaran Lidcol, Off Jalan Yap Kwan Seng, 50450 Kuala Lumpur, which was then its registered address ('the Yap Kwan Seng address'). The writ was posted to the defendant by prepaid registered post at the defendant's subsequent registered address on 13 January 2000 and an affidavit of service was filed. G The registered address of the defendant, according to a search made on 5 January 2000, was 12-1A Jalan Hilir 1, Taman Sri Angsana Hilir, Kampung Pandan, 55100 Kuala Lumpur ('the Kampung Pandan address'). The AR registered acknowledgement card was returned with a signature duly acknowledging receipt of the said writ on 17 January 2000. H The plaintiff then entered judgment in default of appearance on 23 February 2000. The defendant then filed its appearance on 7 March 2000 and filed an application to set aside the in default judgment on 5 May 2000.

I *Preliminary objection*

At the commencement of the appeal, Mr Murthi for the appellant pointed out that whilst the affidavit in support of the application to set aside the

judgment (encl 7) was affirmed by one Ruth Leong, the exhibits referred to by the said Ruth Leong, namely, exhs LCL-1 to LCL-8 were referred to in the 'Sijil Perakuan Ekshibit' attached to each of the exhs LCL-1 to LCL-8, as exhibits to an affidavit affirmed by one Low Cheng Lai and not the affidavit affirmed by Ruth Leong. Mr Murthi argued that since there was no affidavit of Low Cheng Lai, the exhibits were wrongly referred to in the affidavit of Ruth Leong.

Whilst this might have been a valid point to have raised, unfortunately, the plaintiff's officer had himself affirmed an affidavit in reply (encl 9) in which he had specifically referred to exhs LCL-1 to LCL-8 and replied to them. It is my judgment therefore, that the appellant has thus waived, by its conduct, the right to raise this objection.

Findings of the court

It was the case of the defendant that the writ and statement of claim were not served upon the defendant but upon one RK Consultant Sdn Bhd. Mr Murthi, for the appellant conceded to this fact. However, in its affidavit (encl 7), the defendant admitted having received the writ and statement of claim on 28 February 2000 and that on 2 March 2000, the defendant had retained their present solicitors, who on 8 March 2000 entered appearance. A subsequent search made at the registry of companies ('the ROC') which had been exhibited, showed that the registered address had been changed to the Kampung Pandan address. The defendant has not explained how it came to be in possession of the writ and statement of claim on 2 March 2000. At least, the defendant could have obtained an affidavit from RK Consultant Sdn Bhd to state that it had wrongly received the summons. It is my judgment that since the company search from the ROC shows that the business address of the defendant was the Yap Kwan Seng address and the registered address as the Kampung Pandan address, RK Consultant Sdn Bhd must have been authorized by the defendant to receive documentation on the defendant's behalf. I am, therefore, satisfied that the writ and statement of claim were properly served on the defendant at its registered address.

On merits

The plaintiff's claim is in respect of the balance due being the cost of construction and completion of an access bridge, amounting to RM1,103,958.02. Judgment was entered for this exact sum with interest at 8% from date of judgment to realization and costs of RM225. In its affidavit in support of the application to set aside the judgment, the defendant had averred that settlement had been made to the plaintiff or to its agent or to its sub-contractor and disputed the sum claimed. In support of its contention that it had indeed settled the sum claimed, the defendant exhibited numerous vouchers. The plaintiff, on the other hand, denied that it had instructed the defendant to make payment to any third party and pointed out, from the exhibited vouchers, that the defendant had caused to be included in the vouchers exhibited, vouchers and receipts in respect of

- A numerous other projects completed by the plaintiff for the defendant, for which the defendant had made payments. In support, the plaintiff exhibited a document signed by MBf Property Services Sdn Bhd as attorney for the defendant, confirming that the total cost of works done in respect of the access bridge only, was RM5,984,261.71, leaving a final balance outstanding of RM1,103,958.02. The defendant did not file any further affidavit disputing this. To my mind, this is a very clear case where no useful purpose can be gained by setting aside the judgment in default of appearance. The defendant has no defence at all. Clearly, the learned SAR was wrong in granting an order in terms of the defendant's application. I therefore allow this appeal, and set aside the order made by the learned SAR on 6 September 2000. The in default judgment entered is reaffirmed.
- C

Appeal allowed.

Reported by Wong Ee Lynn

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